

No. 89-800

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

NOEL ALVARADO, PETITIONER

v.

UNITED STATES OF AMERICA

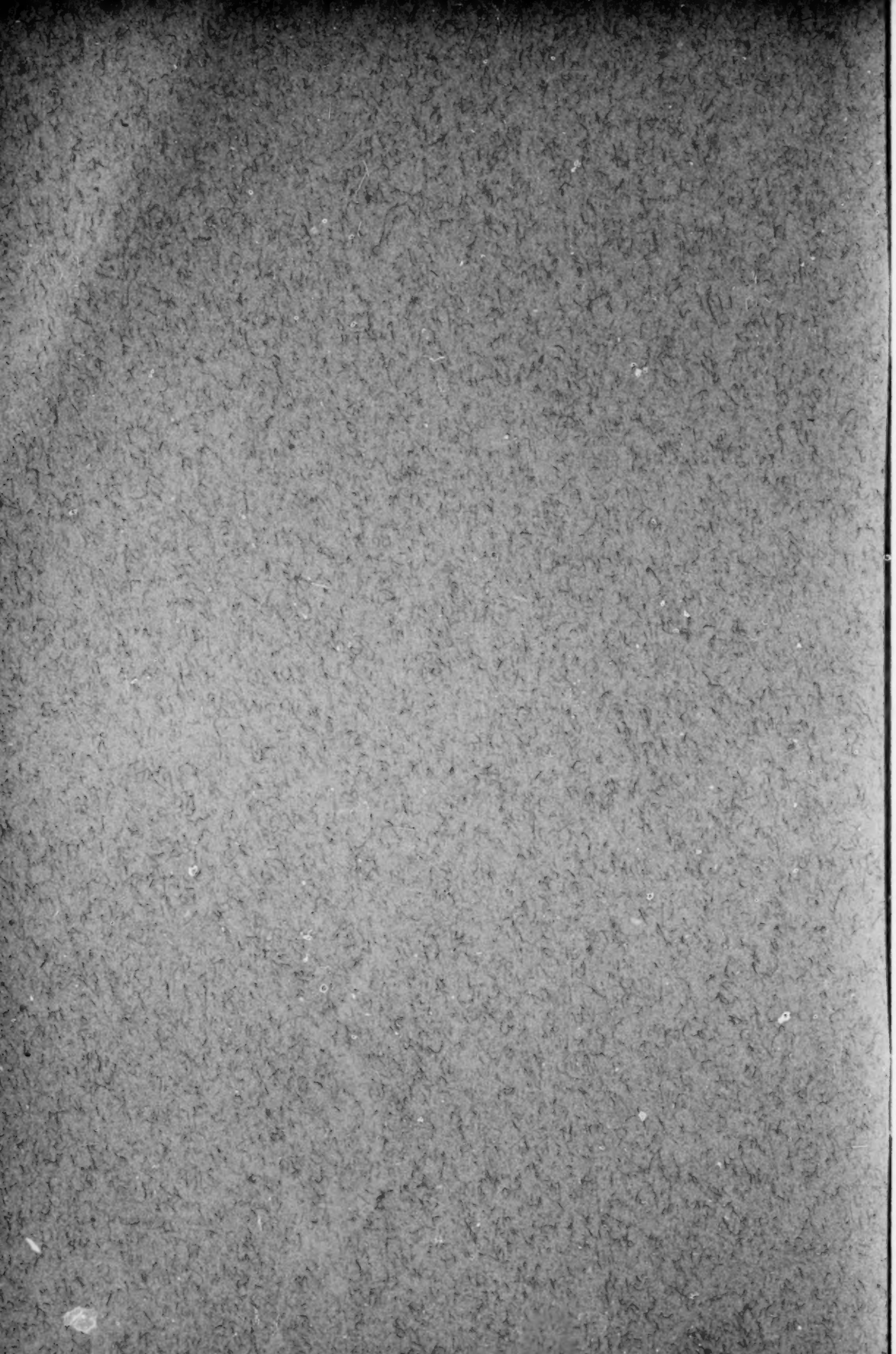
ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission at petitioner's trial of his co-defendant's statement, in which petitioner's name was replaced by the words "another person," violated petitioner's rights under the Confrontation Clause of the Sixth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A24) is reported at 882 F.2d 645. The opinion of the district court denying petitioner's motion for a severance (Pet. App. A29-A30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1989. A petition for rehearing was denied on September 21, 1989. Pet. App. A1. The petition for a writ of certiorari was filed on November 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. 846; one count of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and one count of using a firearm during and in relation to a controlled substance offense, in violation of 18 U.S.C. 924(c). He was sentenced to eight years' imprisonment, to be followed by six years' supervised release, and was fined \$2,500. Pet. App. A26-A27. The court of appeals affirmed. Pet. App. A3-A24.

1. The evidence at trial, which is recounted in the opinion of the court of appeals, showed that an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF) made a number of undercover purchases of cocaine at or near petitioner's apartment in New York City. On each of these occasions, the agent purchased the cocaine from Alex Sanchez, a minor, or from Charles Shannon, although petitioner or his co-defendant Mayra Sanabria were seen in the apartment during some of the transactions. After several purchases, ATF agents executed a search warrant for the apartment. The agents arrested petitioner, Sanabria, and Sanchez in the apartment and seized a large quantity of cocaine, as well as paraphernalia used in packaging cocaine for sale. The agents also recovered three loaded handguns. Pet. App. A5-A6.

After the search, the ATF agents took petitioner, Sanabria, Sanchez, and Shannon to ATF headquarters. There, they advised Sanabria of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Sanabria then gave a statement in which she impli-

cated petitioner in the packaging of cocaine for sale and in the sales to the undercover ATF agent. Pet. App. A6-A8.

At the joint trial of petitioner and Sanabria, the government presented a redacted version of Sanabria's statement through the testimony of an ATF agent. The agent testified that Sanabria had said that she had told "another person" not to sell drugs to a police informant; that she helped "another person" package cocaine for sale; that the person who supplied "another person" with cocaine used teenagers to deliver it; and that she had received \$500 from "another person" at the holding cell at ATF headquarters. Pet. App. A6-A8. The district court refused to admit Sanabria's statement that she lived in an apartment with petitioner because the court found that the statement could not be successfully redacted. Pet. App. A8 n.3. The court instructed the jury that Sanabria's statement could be used only against Sanabria. Pet. App. A18.

2. The court of appeals affirmed, rejecting petitioner's claim that the admission of Sanabria's statement violated the Sixth Amendment as interpreted in *Bruton v. United States*, 391 U.S. 123 (1968). The court first held (Pet. App. A15) that Sanabria's redacted statement did not inculcate petitioner on its face. The court also rejected petitioner's claim that because other evidence at trial linked him to the statement, it was improper to admit the statement. Pet. App. A16-A18.

ARGUMENT

Petitioner renews his contention (Pet. 5-15) that the admission of Sanabria's statement at their joint trial violated his rights under the Sixth Amendment.

In *Bruton v. United States*, 391 U.S. 123 (1968), this Court held that "a defendant is deprived of his rights under the Confrontation Clause when his non-testifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson v. Marsh*, 481 U.S. 200, 201-202 (1987). In *Marsh*, the Court held that *Bruton* does not bar the introduction of a co-defendant's confession if that confession has been redacted to eliminate all reference to the defendant and is only indirectly linked to the defendant by other evidence introduced at trial. The Court explained that when a co-defendant's confession does not directly incriminate the defendant, there is no reason to depart from "the almost invariable assumption of the law that jurors follow their instructions." 481 U.S. at 206, including the instruction to consider the confession only against the co-defendant.

In *Marsh*, the Court did not decide the issue whether a trial court may admit a co-defendant's "confession in which the defendant's name had been replaced with a symbol or neutral pronoun." See 481 U.S. at 211 n.5. Since *Marsh* was decided, however, two courts of appeals, in addition to the court below, have held that as long as the redacted statement is not facially incriminating to the defendant and does not suggest to the jury that it contained actual names, it may be admitted at trial, subject to a limiting instruction. See *United States v. Vasquez*, 874 F.2d 1515, 1518 (11th Cir. 1989), cert. denied, No.

89-5762 (Jan. 16, 1990); *United States v. Garcia*, 836 F.2d 385, 391 (8th Cir. 1987).

This approach fully accords with *Marsh*. That decision recognizes that a jury cannot ignore a "powerfully incriminating" confession that expressly implicates the defendant. See *Marsh*, 481 U.S. at 208. *Marsh* makes clear, however, that a jury can be trusted to obey an instruction to ignore inferentially incriminating statements, even if evidence is introduced at trial that indirectly links the defendant with the person named in the statement. In this case, there was no evidence that directly identified petitioner as the other person described in Sanabria's statement. Accordingly, no violation of the *Bruton* rule occurred.

Petitioner contends (Pet. 9-13) that the court of appeals' decision in this case conflicts with the decision of the Eleventh Circuit in *United States v. Petit*, 841 F.2d 1546, cert. denied, 108 S. Ct. 2906 (1988). In *Petit*, however, the statement in question was redacted to replace the defendant's name with the word "friend," and the evidence at trial left no doubt that the statement "could reasonably be understood only as referring to [defendant]." 841 F.2d at 1556. Under these circumstances, the court of appeals found a violation of the *Bruton* rule, although it held that the error was harmless.

In this case, by contrast, the government introduced evidence of participation by two others in the alleged conspiracy. The undercover ATF agent purchased cocaine from Alex Sanchez and Charles Shannon. Either of those two could have been the person whom Sanabria urged not to sell cocaine to a police informant, the person with whom Sanabria was involved in packaging cocaine, or the person from

whom Sanabria got \$500 in the holding cell.¹ The jury could have concluded that either of those two—or perhaps someone else entirely—was the “[]other person” referred to in Sanabria’s statement. Because the evidence at trial did not lead inexorably to the conclusion that petitioner was the “[]other person,” the decision in this case does not conflict with the decision in *Petit*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

¹ Petitioner claims that “the jury reasonably came to the conclusion that [Sanabria] received [the money] from Alvarado.” Pet. 15. There is no basis for this claim. Although the court of appeals noted that the evidence established Sanabria’s receipt of money from “an accomplice,” Pet. App. A14, the court also noted that Alvarado, Sanchez, and Shannon were all brought with Sanabria to ATF headquarters to be questioned. Pet. App. A6. Thus, the jury could have decided that the words “another person” here referred to Sanchez, Shannon, or some other unidentified accomplice of Sanabria’s.

